IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

VAN GESNER, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error,*	No. 1369
MARION R. BIGGS, *Plaintiff in Error,* *vs.* UNITED STATES OF AMERICA, *Defendant in Error.*	No. 1370

PETITION FOR REHEARING ON BEHALF OF THE ABOVE NAMED PLAINTIFFS IN ERROR, VAN GESNER AND MARION R. BIGGS.

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Filed this.....day of March, A. D. 1907.
FRANK R. MONCKTON, Clerk.

By.....Deputy Clerk.

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The said plaintiffs in error, Van Gesner and Marion R. Biggs, hereby petition the Court for a rehearing of their respective cases, and upon the following grounds:

The importance of the determination of this case to the plaintiffs in error, and the greater importance that this Court shall not err in its administration of the law, makes it our duty

to the Court and to our clients to call attention to what appears to be manifest error in the decision affirming the judgment of the lower court in this case. Necessity for brevity and clearness impels us to present our views with a directness of statement, which would not otherwise be necessary or preferable.

Preliminarily, permit us to say that we cannot avoid the conclusion that the arguments advanced by plaintiffs in error in our reply brief were ignored. Possibly this may have been due to an oversight or omission of the Clerk in distributing the reply briefs; these briefs were filed within the time fixed by the Court's order, and should have been in the hands of the Judges several days before the opinion was prepared.

THE COURT ERRED IN ITS DECISION IN HOLDING THAT A *STATUTE* PROVIDED FOR THE PROOF OF ALL MATTERS AT THE TIME OF FINAL PROOF CONCERNING WHICH IT IS CLAIMED PERJURY WAS COMMITTED. It is stated in the opinion:

> "It is perfectly plain from the provisions of the statute, and the rules and regulations of the Land Department, that in order for any person to effect a purchase of any land under the act in question, he must first make an application to purchase by a verified written statement, which statement is an affidavit as to the truth of the matters therein declared, and, after a compliance with the prescribed procedure, must satisfy the Register of the local Land Office by deposition, in which he and such witnesses as he may produce are examined and cross-examined under oath of the truth of the matters *required by the statute* to be shown as a prerequisite to the authorized purchase. And it is just as plain that intentional false swearing by the applicant in either instance, in respect to any of the material matters *so required to be declared and sworn to*, constitute the crime of perjury, which crime is defined not by any rule or regu-

lation of the Land Department, but by a statute of the United States."

If at the time of final proof the applicant was examined and cross-examined "of the truth of the matters required by the statute to be shown as a prerequisite to the authorized purchase," and nothing further, then there would be some foundation for the decision.

But, as a matter of fact, the regulation provides that there shall be proved at the time of final proof as prerequisite to the purchase matters that are not required by statute to be proved *at all.*

Note question 13, page 304, Transcript of Record, final proof testimony of John F. Watkins: "Have you sold or transferred your claim to this land *since* making your sworn statement?" etc.

It was conceded at the trial that there was no statute providing for proof of the fact that no sale had been made *after the making of the sworn statement,* but it was contended that the regulation made in that behalf had the force and effect of law, and that one who swore falsely concerning that matter was guilty of perjury, and that those who conspired to have him so swear were guilty of conspiracy to suborn perjury. See instructions on pages 1450 and 1451, Transcript of Record.

In the Eaton case there was a statute providing a penalty for the failure to do a thing *required by law;* an omission on the part of Eaton to do a thing required by a regulation properly made, and the decision was that a *regulation* requiring a thing to be done was not a *law* requiring a thing to be done.

No man can be guilty of perjury under section 5392 unless he takes a false oath to a material matter in a case where a *law of the United States* authorizes the administration of an oath.

The section reads as follows, in so far as it pertains to this matter: "Section 5392. Every person who, having taken an oath before a competent tribunal, officer or person, in any case *in which a law of the United States authorizes an oath to be administered, etc.*"

The amendment proposed by Secretary Hitchcock and Commissioner Richards, adding to the section so that it should be perjury if one swore falsely where a regualtion of a head of a department properly made authorized the administration of an oath, has never been adopted.

It is true that section 5392 defines perjury, but it so defines it that a *law* of the United States must authorize the administration of the oath or else it is no perjury, and the Eaton case and the others cited by us show to a demonstration that the regulation under discussion is not such a law.

The particular error to which we are now striving to call the attention of the Court is this: The opininon assumes that the *statute* requires that there shall be proved *at some time* as a prequisite to the right of purchase all of the things which the regulation provides shall be established at the time of final proof, and that this is an utterly mistaken idea a careful reading of the statute will disclose, because as we have seen, the statute nowhere provides that the applicant shall prove *at all* that he has not transferred his claim to the land *since making his sworn statement.*

AS FURTHER GROUND FOR REHEARING WE MOST RESPECTFULLY URGE THAT THIS COURT IS UTTERLY MISTAKEN IN ITS CONSTRUCTION OF THE MEANING OF THE INDICTMENT IN THAT PORTION OF THE OPINION WHEREIN IT IS SAID "IT IS CONTENDED, ON BEHALF OF THE PLAINTIFFS IN ERROR, THAT THE CONSPIRACY, ACCORDING TO THE AVERMENTS OF THE INDICTMENT, 'CONTEMPLATED THAT SUBORNATION OF PERJURY SHOULD TAKE PLACE ONLY WHEN LANDS SUBJECT TO ENTRY UNDER THE TIMBER AND STONE ACTS WERE BEING APPLIED FOR,' AND THEREFORE THAT EVIDENCE TENDING TO SHOW THAT THE LANDS APPLIED FOR BY THE INSTIGATED PARTIES WERE NOT OF THE CHARACTER EMBRACED BY THOSE ACTS WAS INCOMPETENT. THIS OBJECTION PROCEEDS UPON AN ERRONEOUS VIEW OF THE INDICTMENT WHICH DOES NOT CHARGE THAT THE CONSPIRACY ALLEGED CONTEMPLATED THAT THE SUBORNATION OF PERJURY SHOULD TAKE PLACE ONLY WHEN LANDS SUBJECT TO ENTRY UNDER THE TIMBER AND STONE ACTS WERE BEING APPLIED FOR, *BUT THAT THE INSTIGATED PARTIES WOULD SO SWEAR;* WHICH IS AN ENTIRELY DIFFERENT THING, AND QUITE IN LINE WITH THE ALLEGED FRAUDULENT SCHEME."

The indictment alleges as to the particular portion so construed by this Court that the defendants conspired to suborn, instigate and procure certain persons "to state and subscribe, under their oaths, that certain public lands of the said United

States, lying in Crook County, in said District of Oregon, open to entry and purchase under the acts of Congress, approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, which those persons would then be applying to enter and purchase in the manner provided by law, were not being purchased by them on speculation, but were being purchased in good faith to be appropriated to the own exclusive use and benefit of those persons respectfully, and that they had not directly or indirectly made any agreement," etc.—Transcript Record, page 10.

The questions to be discussed here are: *What does this indictment mean?* And second, if it is capable of the meaning now placed upon it, *is not the defendant in error estopped from so contending, having placed a different construction upon the indictment during three trials in the court below, and the first suggestion of the present construction being the opinion rendered in this Court.*

We ask the careful consideration of the Court on this question, *as this is the first opportunity we have had to be heard concerning it.*

While the two questions herein involved are separate, yet a discussion of the one involves such a reference to the other that we shall discuss them together to a large extent, bearing in mind that if it should be held that the Government is not estopped, such fact does not determine the true meaning of the indictment.

This indictment is not an instrument which will ever be incorporated into a book of forms as a model; but, while its meaning is not obvious as to all matters, it can be determined what it means in the particular under discussion.

First, the indictment states in general terms that plaintiffs in error, with other persons, conspired to commit an offense against the United States. Then follows the sentence "That is to say," and after it comes a description more specific as to what the offense so to be committed was, and from what follows *that is to say*, until we reach the second *that is to say* we gather that the offense to be committed was perjury; that it was to be committed in the said district (referring to the District of Oregon); that the perjury was to be committed before a competent officer in cases in which a law of the United States authorizes an administration of an oath; that the testimony would be in writing, and the persons to be instigated would declare that certain declarations and depositions by them to be subscribed were true, and contrary to such oaths subscribe material matters which they should not believe to be true.

Then follows the second *that is to say*.

And it may be noted that after each *that is to say* the pleader particularizes and states more in detail that which has gone before. After the second *that is to say* it is set out more in detail the matter concerening which oaths were to be taken; the indictment describes the land concerning which the false oaths were to be taken, giving quite fully their character and their location; says they were known as timber and stone lands; describes the proceedings in which the alleged perjury was to be committed, and states when the perjury was to be committed.

From that portion of the indictment that follows the second *that is to say* we learn that the perjury was to be committed concerning lands; that they were lands of the United States; that as a matter of fact such lands lay in Crook County and in the

said District of Oregon (notice the use of the word "said" before the words "United States" and "District," not indicating in any manner that the parties to be instigated would use any such word in an oath, or that they would in any way use the expression "said District of Oregon"); that as a matter of fact such lands were open to entry and purchase under the acts of Congress of June 3, 1878, and August 4, 1892; that as a matter of fact the lands to which the alleged perjuries were to relate were known as timber and stone lands, and that as a matter of fact the persons to be instigated would be applying to enter and purchase such lands in the manner provided by law at the time when the alleged perjury would be committed, thus describing the lands as public lands, their location, that they were subject to entry under certain acts, that they were known as timber and stone lands, and the time when and the proceedings in which the alleged perjury was to be committed.

All this precedes the verb *were*, to be found in line 4, page 11, Transcript of Record.

Now, we come to that portion of the indictment showing what the persons to be instigated would swear to, and it is, in substance, that the persons would swear that they *were* not purchasing on speculation, but in good faith; that they had made no contracts, etc., when in fact they had made contracts and were purchasing on speculation.

On page 12 of the Transcript is to be found a portion of the indictment which settles conclusively the question now under discussion. It is charged as follows:

> *"The matters so to be stated, subscribed and sworn to by the said persons being material matters under the circum-*

stances, and matters which the said persons to be suborned instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs *would not believe to be true."*

What are the matters that the persons to be instigated and the plaintiffs in error would not believe to be true? Answer: The matters to be stated, subscribed and sworn to by the persons to be instigated. That, under our construction of the indictment, means that they would not believe to be true the statement that they had made no contract; that they were not purchasing on speculation. (It is to be observed here that the only things that the plaintiffs in error had conspired to have sworn to are the facts set out in the indictment, which do not include all of the matters set out in the sworn statement.) All matters and things which the plaintiffs in error instigated persons to swear to, according to the indictment, were matters which the plaintiffs in error and the persons to be instigated would not believe to be true. If we carry out the construction of the indictment placed upon it by this Court, it follows that the persons to be instigated would swear that the lands to which the conspiracy related *were public lands, but they would not believe that to be true; that they lay in Crook County, but they would not believe that to be true; that they were in said District of Oregon, but they would not believe that to be true;* that persons to be instigated would swear that the lands were open to entry under certain acts; that they would not believe that to be true; that the persons to be instigated would swear that they were then applying to purchase public land in the manner provided by law; that they would not believe that to be true. It is perfectly obvious that the expression "lying in Crook County in said District of Oregon" is in the same construction as the phrase "open to

entry and purchase under the acts of Congress," etc., and no construction can be placed upon this indictment of such a nature as to hold that the indictment charged that the instigated persons were to swear that the lands were open to entry and purchase, but were not in fact so, that would not include the construction that they would swear that they were lying in Crook County, Oregon, when they did not in fact so lie. The expression "and known as timber and stone lands" is just as plainly a statement of fact, and not a statement of what the instigated persons would swear to as a thing could be. Also the words "which those persons would then be applying to enter and purchase, in the manner provided by law," are a statement of fact, and in their relation to the other sentences of the indictment show with clearness that there was no intention on the part of the pleader to charge that the persons to be instigated would swear to this, but that it was true as a fact.

Further, in page 12 of the Transcript:

> "When in truth and in fact, as each of the said persons would then well know, and as the said John Newton Williamson, Van Gesner and Marion R. Biggs would then well know such persons would be applying to purchase such lands on speculation, and not in good faith to appropriate such lands to their own exclusive use and benefit."

Notice the use of the words "such lands," plainly referring to the lands described above. We might as well contend that the indictment charged that the persons to be instigated would swear to the last above quoted sentences of the indictment, and that it was not intended to charge that as a fact, as the government can contend that it is not stated as a fact in this indictment that the lands were open to entry and purchase under the

acts mentioned, and were more valuable for timber than for grazing.

Don't overlook the fact that under the construction of the indictment given by this Court, the instigated persons were to swear that the land was public land; that it was open to entry, etc., and that they would not believe any of these things to be true.

If the pleader had intended to say that the persons to be instigated would swear to these various matters, he would have charged that the persons to be instigated would state and subscribe on their oath that certain lands were public lands; that they were situated in Crook County; that they were open to entry and purchase under the acts of Congress referred to; that they were known as timber and stone lands; that they would swear that they would be applying to enter and purchase the lands in the manner provided by law at the time when they were to take false oaths. He has not done so. It is said that certainty to a common intent in an indictment of this sort is all that is necessary, but under that rule of construction the meaning of the indictment must be obvious. If it is not, it is bad.

The obvious meaning of this indictment is that it charges, as a matter of fact, that the lands to which the conspiracy related were public lands of the United States lying in Crook County, in said District of Oregon; that they were open to entry and purchase under the acts of Congress approved June 3, 1878, and August 4, 1892, and known as timber and stone lands, and that when the alleged false oaths were to be taken the persons to be instigated would be applying to enter and purchase such land in

the manner provided by law. All this is stated as a matter of fact.

There is nothing in the indictment to negative this idea, and the positive statements therein confirm it.

As remarked in the opinion, it is clear from the statute that it is only lands that are chiefly valuable for the timber on them that are authorized to be purchased under acts in reference to timber lands; hence, when it is said in an indictment that the lands, concerning which false oaths are to be taken, are subject to entry under such acts, it is equivalent to saying that they are more valuable for timber than grazing.

Ever since the indictment was filed in this case the government has admitted that the indictment stated, in effect, that the land to which the conspiracy related was more valuable for its timber than grazing.

This indictment was attacked by demurrer, and, among other reasons, because, as the demurrer alleged, the indictment did not "describe or identify the perjury which is alleged to have been suborned or the land as to which such perjury was to be committed." Transcript of Record, pages 30-40.

The defendant in error filed a typewritten brief, saying, among other things, that "it is sufficient to say that the tracts of land are in Crook County, Oregon." In support of this proposition United States vs. Dealy (152 U. S., 539) was cited.

It was not contended by plaintiffs in error that the words following "certain public lands of the said United States" did not describe the kind of land that such persons would be applying to enter, but that such description was not sufficient. The Court held this description sufficient.

If the words "lying in Crook County, Oregon," are matters of description, and indicate as a matter of fact where the land was situated to which the conspiracy related, it is manifest that the words "open to entry and purchase," etc., are matters of description, as they are in absolutely the same construction and describe the kind of land concerning which the alleged false oaths were to be taken.

The testimony tending to show that the land to which the conspiracy related was void of timber *was rejected at the first two trials because the indictment in effect alleged that the land was more valuable for its timber than for grazing;* and at the third trial when this evidence was offered the plaintiffs in error objected to its admission on the ground, among other things, "that the defendants are not charged with suborning perjury in the matter as to the quality of the land, or the timber upon the land, and upon the ground that the indictment alleges that the land is *chiefly valuable for its timber,* and that the government is estopped from claiming otherwise upon the trial. Transcript of Record, 680-681. This objection was overruled, but it was not contended that the construction placed upon the indictment by the plaintiffs in error was wrong, and it never was so contended in the lower court. The Judge, in charging the jury at the last trial (pages 1463-1464, Transcript of Record), said:

> "There is, too, some evidence before you in relation to the character of the land applied for by some of the applicants—that is, whether it was heavily timbered, or stony, or the like. The question of whether or not the lands applied for by the several entry men and entry women were *lawfully of a character subject to entry under the timber and stone law is not directly involved in this charge of a conspiracy to suborn.* The relevancy of such eevidence is

the relationship it may have to the motive or intent or design of the defendants in the doing of the act charged against them in the indictment under which they are tried."

Why did the Judge say to the jury that the question of whether or not the lands applied for by the several entrymen were lawfully of a character subject to entry under the timber and stone act, is not directly involved in a charge of a conspiracy to suborn. Simply because *he was placing upon the indictment the construction for which we are now contending, and which has always been placed upon it.* If the present construction is to prevail, and it is to be held that plaintiffs in error instigated persons to state and subscribe under their oaths that the lands were public lands, that they were open to entry under the acts mentioned, etc., then the question of whether they were open to entry, and whether they were more valuable for timber than for grazing, would be involved, because the indictment states *"matters so to be stated, subscribed and sworn by the said persons being material matters, under the circumstances, and matters which the said persons so to be suborned instigated and procured, and the said John Newton Williamson, Van Gesner and Marion R. Biggs would not believe to be true."* That is, the persons to be suborned would not believe to be true any of the matters and things which they were instigated to swear to. And under the charge in the indictment all of the matters and things which the persons to be instigated were to swear to would not be believed to be true by the persons to be suborned or the plaintiffs in error. We submit that this absolutely settles the construction that was placed upon the indictment as late as the time when the Judge was instructing the jury at the last trial.

Here we have the ruling of two Judges, each upholding our contention as to what the indictment means in the particular under consideration, the first Judge rejecting the testimony in question, because the indictment alleged in effect that the lands were more valuable for their timber than for grazing, and the second Judge at the third trial, although conceding this contention as to the meaning of the indictment, admitted the evidence on the ground that it somehow shed light upon the motives of the parties. Finally, we have the decision of the Appellate Court, overruling each of the Judges as to what the indictment means, and admitting the evidence on the ground that the indictment charges something entirely different from what both Judges who participated in the previous trials had theretofore held. It is true that the Appellate Court concurs with the presiding Judge at the last trial that the evidence was properly admitted, but it does it for radically different reasons, and on grounds that would have caused the Judge presiding at the last trial to have rejected it. No claim is now made that the testimony is admissible on any grounds stated by Judge Hunt.

This procedure may harmonize well enough with the practice in this particular case, but we submit that it is not the law.

Is the United States never estopped in the trial of a criminal case? Can it, in order to meet a certain objection to an indictment, secure one construction of the indictment, and then when another question is raised, in order to avoid a reversal, insist that the indictment means something radically different from its first contention? If the last contention is to be upheld, let the demurrer be sustained.

A man can give as good a description of how a kaleidoscope

looks to all persons under all circumstances, after looking once himself, as he can state the many different meanings that would be attributed to this indictment by different Judges, although he had given the matter the most careful consideration.

Whatever this indictment does mean, we are entitled at least to have one construction of it upheld throughout. The government has no right to place one interpretation upon the indictment to avoid the force of a demurrer, and another in order to prevent a reversal on account of the admission of evidence, especially when the last construction placed upon it would be fatal upon demurrer, and the first construction would be fatal upon the question of the admissibility of evidence.

In order to hold this indictment good, and overrule the demurrer or a motion in arrest of judgment, our construction must be placed upon it. The crime is not sufficiently set forth and described without that portion of the indictment under discussion, and if it is to be held that the portion of the indictment under discussion means what this Court has decided, it means there is absolutely *no description of an offense* to be found anywhere in the indictment that is sufficient under any case that was ever decided. The mere allegations that persons to be instigated would swear that certain lands were public lands; that they were situated in Crook County, in said district; that they were open to entry under certain acts; that they were known as timber and stone lands; that the persons to be instigated would swear that they would then be applying to enter and purchase land which they would swear were open to entry, etc., is not a description that is sufficient; neither is it a description at all, and especially is

this true when the indictment states that the persons to be instigated and the plaintiffs in error would not believe to be true the matters to be stated, subscribed and sworn to by the persons to be instigated.

Up to the commencement of this portion of the indictment under discussion nothing has been said as to what the alleged perjury was to relate.

Here it is stated, if we are correct, that it was to relate to public lands, stating where they were situated, in a general way; their character, and in what proceedings the alleged perjuries would be committed, and under our contention these things are stated as facts, not as matters that the persons instigated would swear to; but if the decision of this Court is correct there are none of these necessary facts stated anywhere in the indictment, but there is substituted therefor in effect a statement that persons would swear to these things, not believing them to be true.

This descriptive matter is of such a nature to show, if we are correct in our contention, that Biggs would be a competent person to administer an oath, and it would show that these were cases in which *a law* of the United States authorizes the administration of an oath, according to the allegations, and this must appear as perjury can be committed only by swearing falsely to material matters in a case where a law of the United States authorizes the administration of an oath. See section 5392, defining perjury. But if these things are not stated as facts, but only as matters that persons would swear to, not believing them to be true, the indictment fails in many an essential particular.

There are many things contained in the sentences and phrases under discussion that an applicant does not in fact swear to. This, of course, is not conclusive, but it throws some light on the subject, if any was needed, as all these sentences and phrases are in the same construction, and if the instigated persons were to swear to one they were to swear to all. If they were to swear that the lands were open to entry under the timber and stone act, they were to swear that they were situated in Crook County, and they were to swear that they were known as timber and stone lands, and were to swear that they would be applying to enter and purchase, etc. On the other hand, if they were not to swear to these things, according to the allegations of the indictment, then these matters are stated as facts.

Realizing that what we are about to state does not bear directly upon the question before this Court; yet, because it explains in part our feeling upon this subject, we say that the evidence concerning the timber was introduced late in the trial, and we believe it false, and all of the land, as the public records will show, to which it is claimed this conspiracy related are now set apart in a forest reserve.

We submit that the voice of authority may affirm the decision of the Court below in admitting this testimony, and in ruling upon many other points, but that the voice of reason will never so declare.

AS A FURTHER GROUND FOR A REHEARING, WE INSIST THAT THIS COURT HAS ENTIRELY OVERLOOKED AND FAILED TO PASS UPON AT ALL A MANIFEST ERROR COMMITTED BY THE TRIAL COURT, NAMELY, THE ERROR COMMITTED IN

CHARGING THE JURY THAT AS FAR AS OVERT ACTS ARE CONCERNED IT IS SUFFICIENT IF THE CONSPIRACY IS FOLLOWED BY SOME ACT DONE BY ANY ONE OF THE DEFENDANTS FOR THE PURPOSE OF CARRYING IT INTO EFFECT."

This error was discussed by us in our original brief, pages 138-141, and in our reply brief, pages 124-125; except in the oral argument, no answer is made to our contention on this point.

In the oral argument it was said in behalf of the government that this contention would be serious but for the fact that this error was cured by the charge, to the effect, that the jury, in order to convict, must find beyond a reasonable doubt that some one of the overt acts charged in the indictment was done by *any one or more of the defendants* for the purpose of effecting the object of the conspiracy. Transcript, 1458.

The indictment charges *certain overt acts against Biggs alone.*

That the first instruction is not cured by the last is too clear for argument, as the alleged curative instruction does not apply the rule correctly to this case, as it assumes that an overt act charged may have been committed *by some one other than Biggs, which is impossible.* That an overt act charged must be proved to the satisfaction of the jury, and that it is for the jury to say whether such an act, when proved, was done to effect the object of the conspiracy, is plainly the law of the land; and there is no more doubt about it than there is that twice two makes four, and a person might as well discuss the one question as the other.

However, we repeat our former citations, so that this Court may conveniently refer to the decisions:

U. S. vs. Cassidy, 67 Fed. Rep., 689.
U. S. vs. Newton, 52 Fed. Rep., 285.
U. S. vs. Goldberg, 7 Bliss (U. S.), 175.

According to the government's contention, made orally, there is only one contention here involved, and that is this: Is the erroneous instruction cured?

Nothing is said about this matter in the printed brief of the government, as we believe, because no argument could be made that would bear the light.

We ask this Court to pass upon this question and say, if this judgment must be affirmed, how it is that there is no error here; but if no plausible argument can be found, we ask a reversal.

It is not an overstatement to say that it is of the utmost public importance that these defendants have a trial according to the rules of law, and that it is of great public importance that the intelligent citizenship of the State of Oregon, that does not rely entirely upon newspaper comment, should so believe.

We think we are right in demanding a decision on this point.

If the briefs were to be printed with the opinion, so that all could see what questions were raised and what passed on, no Appellate Court would think of disregarding a question of this kind. Our rights are the same, however, whether the record discloses the whole truth or not. We assume that this point, and some others to which the Court's attention was called, were over-

looked, from the fact that they are not discussed by the printed brief of the defendant in error.

IMPEACHMENT OF THE WITNESS BRANTON.

The proposition as to whether this important witness for the defendant could be impeached in relation to COLLATERAL MATTERS this Court does not, in its opinion, *seem to pass upon at all.* We have always thought this proposition so absolutely clear under the authorities that there was no room for argument or question whatever, and that the ruling, by which the Court permitted this witness to be impeached before the jury upon purely collateral matters, was so clearly error that upon it alone the Court could not do otherwise than reverse the case.

We cannot believe that the Court intended to ignore so important a question, or what, to our mind, is so clear an error, and, therefore, we must assume that in the vast amount of literature that has been presented in the case the Court has overlooked this question. We, therefore, call the attention of the Court again to a discussion of this point upon pages 140 to 150 of the reply brief, and especially to the authorities cited on page 149 and on page 150, as well as to the discussion of the same question on pages 142 to page 145 of the main brief.

The other points presented in the main brief are directly passed upon by this Court, and we will not ask the Court for a re-consideration of its rulings thereon. But as it seems to us, in relation to the matters herein presented, that the Court can only reach the conclusion of affirmance in this case by entirely overlooking the two clearest and unanswerable points in plaintiffs' contention, about which there is not the least chance for argument, and by a construction of the indictment in relation to the timber matter, which we submit, that this Court itself cannot, after a careful examination, insist upon.

In saying this we do not forget the insignificance of the writers of this brief, or the little influence to which their mere opinion is entitled; but we have trust and confidence that in this honorable court, however humble and obscure may be the attorneys for the plaintiffs in error, if they have ANYTHING TO SAY, it will receive the same fair consideration and careful attention as if presented by the most eminent attorneys in all the land.

If this case were being tried in the court of some despotic land, where such court was wholly dependent upon the government, and was its mere instrument to declare its will, we might think that it was useless to attempt to press this matter further, feeling that such a court would find some way to decide in favor of the government, in a matter where such government was directly interested, and that, if it were clearly shown that one position was untenable, it would fasten to some other way by which the same result would be reached.

But in our land, where the courts are entirely independent, and where it is our pride and our boast that it is so, we have confidence that the wishes, or feelings, or desires of the government will have no influence, and that the humblest suitor will receive the same consideration as the most powerful, or as the government itself; and in this spirit we ask the Court whether, if this were a civil case involving only the civil rights of parties, and not their liberty and reputation, would such an error as the one in the matter of the impeachment of the witness Branton be overlooked for a moment, or would a judgment depending thereon be permitted to stand for any longer time than it took to get the mandate of this Court to the court below?

As we have already shown, case after case, both civil and criminal, have been reversed upon this identical ground, and in one of those cases the honorable Judge who delivered the opinion in this case participated. (See Pierce vs. Schaden, 59 Cal., 540).

In view, then, of these considerations, we respectfully ask the Court for a rehearing upon the questions hereinbefore presented.

There is another matter which we desire to submit to the Court as a matter of right and justice. One branch of this same case is now pending before the Supreme Court of the United States, and it will very soon be decided. In passing upon that

case, if the Court takes jurisdiction at all, it will necessarily pass upon the MERITS OF EVERY QUESTION WHICH IS INVOLVED HEREIN.

It is sometimes assumed that in a case of this kind a party can only go into the Supreme Court on the question of JURISDICTION ALONE, and there is something in the opinion of the Court in this case that seems to indicate that the honorable Judge who wrote the same had that in mind; but we submit that this grows out of a confusion of a case like this with a case which is certified up by this Court, or which goes up on appeal on JURISDICTIONAL grounds. Here the question is not JURISDICTIONAL, but CONSTITUTIONAL, and a different rule applies; and if it is a constitutional question which is not frivolous, the Supreme Court takes it up and passes not only upon the constitutional question, but also upon *everything presented* BY THE RECORD IN THE CAUSE.

In the Burton case, the case went up to the Supreme Court upon exactly the same grounds as in this case. That is, upon the ground that a constitutional question was involved in the sentencing of a Congressman or member of the Senate in any way, which, if carried out, would interfere with his attendance at the sessions of Congress; and the Court held that this question was not frivolous, and was sufficient to bring up the whole record, and the Court reversed the case on *other* GROUNDS, refusing to pass upon the constitutional question at all, saying:

> "However that may be, the question IS NOT FRIVOLOUS, and in such a case the statute grants to this Court jurisdiction to issue a writ of error directly to the District Court, and then to decide the case WITHOUT BEING RESTRICTED TO THE CONSTITUTIONAL QUES

TION. It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case. Having jurisdiction to decide all questions in the case upon this writ of error, we deny the motion for a certiorari (it seems there must have been an application for a certiorari extraordinary from the Supreme Court to the Court of Appeals, or to the Circuit Court) and proceed to an examination of the record."

And, as we have seen, the Court did proceed to examine the whole record and pass upon all the questions involved except the constitutional one, which really brought the case there, which was left undecided.

Burton vs. United States, 196 U. S., 283.

It being clear, then, that the Supreme Court will pass upon every point involved in this case on exactly the same record and that very shortly, we respectfully ask the court to let the final decision in these cases rest until the Supreme Court shall have passed upon the questions involved so that if the Supreme Court shall perchance find that there was error in the Court below, that we may have the advantage of their learning and erudition and the reasoning they may offer upon a re-hearing in this court.

To our minds there could be nothing that would so discredit the administration of the law in the minds of the public and so destroy that confidence of the people in the law and the courts which all agree is so important and so much to be desired, as the fact (if it should turn out to be a fact) that these two defendants should be serving a sentence in jail when the Supreme Court of

the United States upon the same record had declared THAT THEY HAD NOT HAD A FAIR TRIAL ACCORDING TO THE RULES OF LAW.

Of course this court has it in its power to push the ultimate decision of this case ahead and to bring it in in advance of that of the Supreme Court and in that event its decision would be controlling upon these defendants and they would have no redress, but we appeal to the discretion of the court in this matter and ask that it be not done. The delay cannot be great and a few weeks intervening we submit, as a mere matter of time, are of no great importance to the government or to the defendants.

Respectfully submitted,

H. S. WILSON,

A. S. BENNETT,

Attorneys for Plaintiffs in Error.

I, Alfred A. Bennett, and I, H. S. Wilson, hereby certify that I am counsel for Van Gesner and Marion R. Biggs, plaintiffs in error named in the foregoing petition for rehearing filed in their behalf and I hereby certify that in my judgment said petition for rehearing is well founded and that it is not interposed for delay.

ALFRED S. BENNETT,

H. S. WILSON,

Counsel for Van Gesner and Marion R. Biggs, Plaintiffs in Error and Petitioners for Rehearing.